Supreme Court, U.S.
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No. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners

vs.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents

APPELLANTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

I.

Does the convoluted exemption scheme described in Alabama Justice Maddox' dissenting opinion – attacked for the first time ever in the case at bar – warrant reversal of the Alabama Supreme Court's decision in this case on federal equal protection grounds?

We contend that it does, because neither the State of Alabama nor Jefferson County can advance any rational interest served by the crazy salad exemption scheme built into the Jefferson County occupational tax.

II.

Can Alabama, through interpretation of its state case law pertaining to *res judicata*, deny plaintiffs' never before presented, and never before heard, federal constitutional claims, thus denying plaintiffs due process of law?

We contend that it cannot, and that the Alabama Supreme Court's reversal of a denial of summary judgment below – unless reversed by this Honorable Court – will effectively deny these plaintiffs any opportunity to ever be heard upon meritorious federal constitutional claims. We contend that because no party to a prior proceeding, *Beddingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), which went to judgment before the effective date of the tax, had ever paid it, no one in *Bedingfield, supra,* could have launched the exemption scheme attack made here.

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	Edwin A. Strickland Charles S. Wagner Jeffrey M. Sewell Charlie D. Waldrep Thomas L. Stewart William M. Slaughter Richard H. Walston
Petitioners' Counsel	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority
Trial Judge	Hon. John Rochester
Petitioners	Jason Richards Fannie Hill and a class of similarly situated persons
Supreme Court of Alabama	Hon. Sonny Hornsby Hon. Hugh Maddox Hon. Reneau Almon Hon. Janie L. Shores Hon. J. Gormon Houston Hon. Mark Kennedy Hon. Kenneth F. Ingram Hon. Ralph Cook Hon. Terry Butts

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254 because this Petition is from a decision of the Supreme Court of Alabama in a civil case.

(i) Date of the decision: March 31, 1995

(ii) Application for Rehearing Overruled: June 9, 1995

(iii) No cross petition has been filed.

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 10.1(c) of the Rules of the Supreme Court.

(v) Writ of Certiorari granted November 22, 1995.

STATEMENT OF THE CASE

(1) Nature of Case, Course of Proceedings and Disposition

On May 20, 1988 the Alabama Supreme Court decided *Bedingfield* v. *Jefferson County*, 527 So.2d 1270 (Ala. 1988), rejecting three separate challenges to the county occupational tax here in issue on state law grounds. (R. 231) The same three state law issues had been decided adversely to the *Bedingfield* challengers in a state trial court, prompting that appeal. (R. 265) *Bedingfield, supra,* was not a class action, and did not decide any federal question in the trial or appellate court. A final judgment in the *Bedingfield* case was entered three weeks before the tax became effective. (R. 340)

Neither the plaintiffs nor the defendant in the *Bedingfield* case ever sought to add any additional parties or to make their case a class action, though Alabama's class action practice is well established. Rule 23, *Alabama Rules of Civil Procedure.*

Bedingfield , supra, was decided on these three esoteric state law issues: (1) Whether Jefferson County's occupational tax violated the intent of its own enabling act; (2) Whether the Alabama Constitution was violated by the

enabling act's "bracket bill" status (in Alabama, a "bracket bill" is one which addresses counties by population "brackets" rather than by name), or by the enabling act's similarity to "special, private or local laws" forbidden by the state constitution, *Constitution of Alabama*, 1901, §§ 105, 106, 110, Amendments 375, 389; and (3) Whether the enabling act violated § 104(15) of the *Constitution of Alabama*, 1901, which prohibits local laws from regulating the assessment or collection of taxes. (R. 231) The Circuit Court for Jefferson County decided all three issues in Jefferson County's favor on December 11, 1987 — three weeks before the January 1, 1988 effective date for collection of the tax. (R. 265) Both *Bedingfield* decisions are before this Court in the joint appendix. They reveal a sweeping victory for Jefferson County on all three narrow state law issues, both in the trial court and before the Alabama Supreme Court. After the *Bedingfield* appeal, Jefferson County began collecting its occupational tax.

On April 21, 1992 Jason Richards and Fannie Hill filed a class action complaint in state court, attacking the exemption scheme built into the same county occupational tax. Hill and Richards claimed that the exemption scheme built into the tax denied them equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

A motion for summary judgment, based upon a defense of res judicata, claimed to have resulted from the *Bedingfield* decision, was filed by Jefferson County in the trial court on June 4, 1992. (R. 218) The trial court considered what the *Bedingfield* case was, and was not, in ruling on Jefferson County's motion. (R. 414) *Bedingfield* was not an attack on the exemption scheme built into the occupational tax (indeed, until the county began collecting its occupational tax, no one had standing to complain about exemptions from taxation). No federal constitutional claims were decided by either court in *Bedingfield*, and *Bedingfield* did not

involve attempts by any party to join or effect service of process upon any individuals other than the parties plaintiff and defendant. (R. 414) Neither Jason Richards nor Fannie Hill nor any member of the class they represent were given notice of any kind — actual or constructive — that any claim they might wish to pursue under the Constitution of the United States, after collection of the tax began, could or would be in any way impaired by the *Bedingfield* case. (R. 265)

In the instant case, on April 8, 1993, Jefferson County was granted summary judgment upon all state law claims, but summary judgment was denied as to petitioners' federal constitutional claims. (R. 414) Jefferson County and an intervenor tax recipient, Birmingham-Jefferson Civic Center Authority, then appealed the trial court's denial of summary judgment as to these federal constitutional claims to the Alabama Supreme Court. (R. 418)

The Alabama Supreme Court reversed the trial court on March 31, 1995 and overruled an application for rehearing on June 9, 1995. The dissenting opinion in the Alabama Supreme Court made it clear that no claim remotely similar to these was presented to, heard by, or decided by either the trial court or the Alabama Supreme Court in *Bedingfield*, *supra*. But five justices of the Alabama Supreme Court interpreted this Court's decision in *Heiser* v. *Woodruff*, 327 U.S. 726 (1946), to compel preclusion of the federal claims made by Richards and Hill.

Richards and Hill filed a timely Petition for Writ of Certiorari in this Court, and on November 22, 1995 the writ was granted.

(II) Statement of Facts with References to Record

In *Bedingfield*, which appears in the joint appendix as well as the record on appeal, the Alabama Supreme Court decided that Jefferson County Ordinance 1120 — the

occupational tax here in issue — was not illegal because (1) a statute authorized the county to levy the occupational tax, (2) the statute was general, rather than local legislation, and (3) the statute authorizing levy of the tax provided also for its collection. (R. 231) Neither the trial court's decision in that case, nor the decision of the Supreme Court of Alabama in that case, contained any reference to whether the enabling act or the county ordinance violated any provision of the Federal Constitution. (R. 231, 265) Neither addressed nor decided the validity of the exemption scheme built into the tax. (R. 231, 265)

Richards and Hill sued Jefferson County and its Revenue Department Director, specifically alleging that "[t]his action involves a violation of federal law for which 42 U.S.C. § 1983 provides a remedy." They claimed that the tax here in issue, by its terms, and in actual practice, exempted from its levy, collection and payment "businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, *Code of Ala.* 1975, as amended, which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and includes a specific exemption for domestic servants employed in private homes." (R. 8) Citing the Fourteenth Amendment to the Constitution of the United States, Richards and Hill specifically averred that the exemption scheme built into the occupational tax denied them equal protection of the laws because it was arbitrary, capricious, irrational and discriminatory in a manner which defied logic. (R. 9) They further complained that the net effect, dollarwise, of the occupational tax, was an absurdity which allowed persons earning hundreds of thousands of dollars a year to completely avoid the tax by paying, individually or through their employers, a small license fee (collected pursuant to Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 40-21-53, 40-21-54 and 40-21-55; 40-21-57, 40-21-58,

40-21-59 and 40-21-60; 40-16-6; and 27-4-9 of the *Code of Ala.* 1975, as amended) or, in the case of "domestic servants employed in private homes" (Hill is a domestic servant employed in commercial buildings) by county fiat. (R. 7) Richards and Hill complained that the content, nature and characteristics of their employment was neither reasonably, rationally or fairly different, nor professionally distinct, from the content, nature and characteristics of the employment of persons exempt from the tax. (R. 17) Evidence heard by the trial court bears them out: Jefferson County's Director of Revenue testified that Richards, a law firm courier, paid $31.35 in 1991 on his salary of $6,269, while his employer, an attorney, paid nothing upon an income sixty times greater. (R. 353) He also admitted: "I do not know what was in the minds of the county commissioners in 1987, when the ordinance was adopted exempting 'domestic employees employed in private homes.'" (R. 386)

Totally exempted from the tax are persons who happen to be employed by or as:

> utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine and comptrometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply and mining supply brokers and agents; broom, brush and mop manufacturers;

cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers, palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight of-hand artists; lightning rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; pool halls, owners

of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe and cafeteria operators; roadhouses, nightclubs and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machines salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers.

The price for complete exemption from the tax is minuscule for persons who hold a license of any kind. By way of example, a manicurist pays a state license tax of five dollars, and nothing to Jefferson County, and thereby beats the tax. *Code of Ala.*, 1975, § 40-12-127. A dentist pays twenty-five dollars to the state, and nothing to the county, and achieves complete exemption. *Code of Ala.*, 1975, § 40-12-92. Engineers pay twenty dollars to the state and nothing to the county, and become automatically exempt. *Code of Ala.*, 1975, § 40-12-99. Fortunetellers and crystal ball gazers pay forty dollars for the same result. *Code of Ala.*, 1975, § 40-12-104. Lightning rod installers pay $7.50 to the state and $2.50 to the county. *Code of Ala.*, 1975, § 40-12-120. Chiropractors pay twenty dollars to the state, and nothing to the county, as do shooting gallery operators and mule dealers. *Code of Ala.*, 1975, § 40-12-136, 40-12-112, 40-12-157. Doctors, plumbers and collection agents avoid the tax for payment of twenty-five dollars to the state, and nothing to the county. *Code of*

Ala., 1975, § 40-12-126, 40-12-145, 40-12-80. Scientists and musicians pay ten dollars to the state and nothing to the county. *Code of Ala., 1975*, § 40-12-155, 40-12-82. The list goes on and on without rhyme or reason.

More significant even than the licensees, however, are the employees of insurance companies, express companies, railroads, banks and public utilities, who purchase no licenses, pay nothing whatsoever to the state or the county, but receive complete exemption from the tax. *Code of Ala.*, 1975, § 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; 27-4-9. (R. 337) Pursuant to a definitional exemption grant (describing who will and will not pay its occupational tax) Ordinance No. 1120, Section 1(B), Jefferson County completely exempts, without explanation, all employees of these powerful business interests without requiring licensure, or payments of any kind to the state or the county. (R. 337)

Meanwhile, teachers, policemen, laborers, domestic servants in commercial buildings, law firm couriers, secretaries and anyone else who can't buy a license or secure employment with one of the favored businesses listed at Section 1(B) of Ordinance No. 1120, pay a full half percent of their "gross receipts" and "compensation" to Jefferson County for the privilege of working inside the county line. Ordinance No. 1120, Sections 1(F), 2. (R. 336)

ARGUMENT

I. JEFFERSON COUNTY'S TAX EXEMPTION SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE GUARANTEES OF THE FOURTEENTH AMENDMENT BECAUSE IT IS NOT EVEN MINIMALLY RATIONAL.

Ten years ago, this Court held that when a tax exemption scheme distributes benefits conferred by a state unequally, the distinctions made therein are subject to scrutiny under

the Equal Protection Clause of the Fourteenth Amendment. *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985). New Mexico, by statute, had exempted from its state property tax $2,000 of the tax value of property owned by honorably discharged veterans who served on active duty during the Vietnam war, but had limited application of this exemption to veterans who were New Mexico residents before May 8, 1976. Hooper qualified for the exemption in all other respects, but failed to establish a residence in New Mexico until 1981. He applied for the $2,000 exemption, nevertheless, and was denied it based upon his newcomer status. After losing in his efforts to invalidate this discriminatory exemption feature on equal protection grounds before the Bernalillo County Assessor, the County Valuation Board and the New Mexico Court of Appeals, Hooper was granted certiorari here. This Court wasted no time reversing all three New Mexico decisions upholding the exemption scheme because there was simply no rational state interest served by its clear relegation of Vietnam veterans arriving after May 8, 1976 to a status of "second class citizens." 472 U.S. at 623. New Mexico's contention that its exemption scheme rewarded "its own" citizens with gratitude for their honorable military service was rejected here, and this Court held that if a statutory tax exemption scheme cannot pass the minimum rationality test set forth in *Zobel* v. *Williams*, 457 U.S. 55 (1982), equal protection is violated and its inquiry ends. 472 U.S. at 623.

Zobel, supra, involved a statutory scheme for the distribution of state mineral deposit income, in the form of dividends, to all adult residents of Alaska. Mr. and Mrs. Zobel objected to the distribution scheme, a dividend unit plan, because it allowed adult residents one "unit" for each year of residency subsequent to 1959 — the first year of Alaskan statehood. Because they moved to Alaska in 1978, the Zobels insisted that the dividend distribution plan was unfairly discriminatory, and violated the guarantees of the

Equal Protection Clause of the Fourteenth Amendment. They claimed it could not pass this Court's minimum rationality test. 457 U.S. at 61. After an exhaustive analysis of its minimum rationality precedents, a majority of this Court tersely held:

> In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then. We hold that the Alaska dividend distribution plan violates the guarantees of the Fourteenth Amendment.
>
> —457 U.S. at 65

In so doing, this Honorable Court made it clear that Alaska's only apparent justification for the retrospective aspect of its dividend unit program, "favoring established residents over new residents," was constitutionally unacceptable, citing *Vlandis* v. *Kline*, 412 U.S. 441 (1973). See also, *Shapiro* v. *Thompson*, 394 U.S. 618 (1989).

Tax assessments, rather than exemptions, were the subject of a similar analysis in this Court in *Allegheny Pittsburgh Coal Company* v. *Webster County*, 488 U.S. 336 (1989). There, West Virginia citizens experiencing recent sales of property were assessed in a manner determined by this Court to involve "gross disparities" when compared to their neighbors whose properties had not recently sold. A trial court in West Virginia found that the Webster County Assessor systematically and intentionally discriminated against recent sale property owners by imposing a tax rate often thirty-five times higher than the rate imposed upon their similarly situated neighbors without any other justification for that distinction. It therefore concluded that the scheme was in violation of the Fourteenth Amendment's Equal Protection Clause. The Supreme Court of West Virginia reversed. This Court granted certiorari and again reversed,

based upon the Court of Appeals' failure to recognize the comparative aspects of Allegheny Pittsburgh's complaint. 488 U.S. at 342. Citing *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946), this Court held that the Equal Protection Clause protects an individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. 488 U.S. at 345.

Applying similar logic, this Court examined a "special use" permit requirement within a zoning scheme in *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). There, a group home determined by the city to be a "hospital for the feeble minded" was attacked by a group home owner as violative of equal protection. A federal district judge in Texas upheld the city's right to discriminate against the home and its proposed inhabitants because it found that mental retardation conferred neither suspect nor quasi-suspect status upon them. 473 U.S. at 437. The Fifth Circuit reversed, based upon its conclusion that mental retardation warranted at least quasi-suspect classification and, therefore, higher scrutiny in the district court. This Court granted certiorari because it disagreed with the Fifth Circuit's classification analysis. Although mental retardation was held not to confer quasi-suspect status upon the Cleburne Living Center's residents, this Court nevertheless held classification status was of no consequence because the City of Cleburne's zoning scheme could not pass the minimum rationality test applied in *Hooper* and *Zobel*, *supra*. U.S. citizenship alone was held to be sufficient, under the Fourteenth Amendment, to invoke minimum rationality protection, as follows:

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See *Zobel* v. *Williams*, 457 U.S. 55, 61-63, 102 S.Ct. 2309, 2313-2314, 72 L.Ed.2d 672 (1982); *United*

States Dept. of Agriculture v. *Moreno*, 413 U.S. 528, 535, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973). Furthermore, some objectives—such as 'a bare . . . desire to harm a politically unpopular group,' id., 534, 93 S.Ct., at 2826—are not legitimate state interests. See also *Zobel, supra*, 457 U.S. at 63, 102 S.Ct. at 2314. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

— 473 U.S. at 445.

With the benefit of that standard, this Court conducted a comparative analysis of the types of dwellings which the City of Cleburne required to obtain special use permits and the types not required to do so:

> In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.
>
> — 473 U.S. at 449.

Thus, it was many other similarly situated persons, occupying homes which were in no rational way different from the group home located at 201 Featherston Street, but enjoying complete exemption from the special use permit process, which clinched equal protection relief.

Another tax case, *WHHY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968), extended this Court's long standing series of foreign corporation discrimination decisions to arbitrary witholdings of tax exemptions. In *WHHY, Inc., supra*, New Jersey granted complete exemption from state real and personal property taxes to domestic nonprofit organizations, but refused to make the same exemption available to otherwise qualified foreign nonprofit corporations. New Jersey claimed it had a right to so discriminate, and its Supreme Court agreed. This Court reversed on minimum rationality grounds which are relevant here, explaining:

> "This Court has consistently held that while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, 'the adopted corporations are entitled to equal protection with the state's own corporate progency, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis.' *Wheeling Steel Corp.*. v. *Glander*, 337 U.S. 562, 571-572, 69 S.Ct. 1291, 1296, 93 L.Ed. 1544. See *Reserve Life Ins. Co.* v. *Bowers*, 380 U.S. 258, 85 S.Ct. 951, 13 L.Ed.2d 959; *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372; *Southern R. Co.* v. *Greene*, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536. Yet New Jersey has denied the appellant a tax exemption which it accords other nonprofit corporations solely because of the appellant's foreign incorporation. This is not a case in which the exemption was withheld by reason of their foreign corporations' failure or inability to benefit the State in the same measure as do domestic nonprofit corporations. Compare *Board of Education of Kentucky Annual Conference of Methodist Episcopal Church* v. *State of Illinois*, 203 U.S. 553, 27 S.Ct. 171, 51 L.Ed. 314. Nor have the appellees advanced any other distinction between this appellant and domestic non-

> profit corporations which would justify the inequality of treatment."

This Court found from the record that WHHY had not been accorded equal treatment, and that the inequality it suffered was not because of the slightest state interest in the "decisive transaction, but solely because of the different residence of the owner". (citing *Wheeling Steel Corporation, supra*). 393 U.S. 117 (1968).

Alabama learned little from *WHHY, Inc., supra.* It was therefore compelled to subsequently appear in this Court, by and through its Insurance Commissioner, in *Metropolitan Life Insurance Company* v. *Ward*, 470 U.S. 869 (1984). *Metropolitan Life* involved two asserted purposes for imposing insurance premium taxes upon domestic corporations at substantially lower rates than those imposed upon foreign corporations — encouraging formation of new domestic insurance companies in Alabama and encouraging investment in local assets and government securities. 470 U.S. at 869. Neither purpose was actually served by penalizing foreign insurers with a higher tax, and recognition by this Court of Alabama's inability to articulate any legitimate purpose for so obviously penalizing foreign corporations carried the day for Metropolitan Life Insurance Company. 470 U.S. at 881.

A common thread runs through each of these relatively recent vintage decisions, and its origin can be traced to an earlier, unassailable decision, *F. S. Guano* v. *Virginia*, 253 U.S. 412 (1920), which simply held:

> [C]lassification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.
>
> — 253 U.S. at 415.

This standard was designed to keep governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992).

In the case at bar, the unreasonable, arbitrary and irrational exemption scheme built into the Jefferson County occupational tax makes the equal protection violations condemned in *Hooper, Zobel, Allegheny Pittsburgh, Cleburne Living Center, WHHY, Inc.*, and *Metropolitan Life, supra*, appear mild and comparatively inconsequential. Neither the State of Alabama nor Jefferson County can advance any rational governmental interest served by granting complete occupational tax exemptions to the bizarre array of persons described here in brief, and in the dissenting opinion of Alabama Supreme Court Justice Maddox. Manicurists, mule dealers, fortunetellers and engineers are not fairly different in the workplace from teachers, police officers and law firm couriers. Doctors, plumbers and collections agents do not contribute anything to the fabric of Jefferson County society or government different from the contributions of secretaries, laborers and federal judges. The only excuse Jefferson County offers for this loony patchwork of exempt occupations is the fact that its enabling statute prevents their taxation. While such candor is noble, when compared with the rationality claims advanced by local government in *Cleburne Living Center, supra*, it does not confer rationality upon this convoluted, cockamamie exemption scheme. New Mexico at least claimed to be favoring "its own" veterans over outsiders in *Hooper, supra*, and in *Zobel, supra*, Alaska was at least able to advance some provincial rationale for favoring old timers over newcomers. Here, Jefferson County sheepishly admits that only peculiarities of state law prevent it from calling this tax what it really is — an income tax — and that state law further prevents it from taxing anyone who purchases a license of any kind, or secures employment with a bank, insurance

company, public utility or other employer with sufficient clout to be listed among the enabling act's favored callings.

We respectfully submit that, in the history of this Court's decisions addressing the equal protection guarantees under the Fourteenth Amendment, no more irrational violation than this one has appeared. It is not merely violative of the United States Constitution, it is obnoxious to it.

II. RICHARDS' AND HILL'S FEDERAL CONSTITUTIONAL CLAIMS ARE NOT BARRED BY *RES JUDICATA*, BECAUSE THEY ARE SUBSTANTIALLY DIFFERENT PERSONS FROM THE PLAINTIFFS IN *BEDINGFIELD*, AND ARE PURSUING A SUBSTANTIALLY DIFFERENT CAUSE OF ACTION.

We have no quarrel with Alabama's definition of the four necessary elements for a claim preclusion, or res judicata, defense:

> (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits.

or with its leap, if and when all four elements are met, to this Honorable Court's conclusion in *Heiser* v. *Woodruff*, 327 U.S. 726, at 735, that "[i]n general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit". We do, however, disagree sharply with its reliance upon *Heiser* v. *Woodruff*, *supra*, for the proposition that these wholly different parties, prosecuting a wholly different cause of action (which could not have been litigated in *Bedingfield*), are bound thereby. *Heiser*, *supra*, involved an attempt to re-litigate in bankruptcy court a fraud claim twice litigated — once by a bankrupt and once by his trustee. It did not address claims by strangers to a

previous action (like Richards and Hill) which could not have been presented in the earlier action (because they did not begin to accrue until three weeks post judgment).

Our quarrel is with the Alabama Supreme Court's failure to recognize that elements three and four of its test definition are missing in the case at bar, and with its failure to consider that the Richards and Hill attack on the exemption scheme built into the Jefferson County occupational tax could not have been heard in the *Bedingfield* case, because no party there was a taxpayer. (R. 265) When *Bedingfield* was decided, no human being had ever paid the tax. (R. 340) Therefore, no *Bedingfield* plaintiff had standing to attack this exemption scheme.

Obviously, Jason Richards and Fannie Hill are not the same persons as Hoyt Bedingfield, Carolyn Phillips, John Rogers and Dale Patton. Aware of this, the Alabama Supreme Court appears to have confused the fiduciary exception for collateral estoppel cases, recognized by this Court in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), with its cases involving claim preclusion, or *res judicata*. This is unfortunate because, even if this were a collateral estoppel case — which it is not — the absence of any fiduciary relationship by and between the *Bedingfield* plaintiffs and those here would compel application of the *Sea-Land Services* general rule "that nonparties to the first action are not bound by a judgment or resulting determination of issues." 414 U.S. at 593, citing *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 320-327 (1971).

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) is a more applicable and instructive decision. There this Court held, after a grant of certiorari to the Seventh Circuit Court of Appeals, that a parent company never designated as a party or served with process in an antitrust case could not be enjoined in a suit against one of its subsidiaries. This Court opined: "*It is elementary* that one is not bound by a judgment in personam resulting from

litigation in which he is not designated as a party or to which he has not been made a party by service of process." 365 U.S. at 110 (Emphasis supplied). This exact rationale is clearly applicable here, where Richards and Hill had no relationship whatsoever to the *Bedingfield* plaintiffs, and could not have been in privity with them. No *Bedingfield* plaintiff ever paid a penny to Jefferson County in occupational taxes, because the tax was simply not in effect on December 11, 1987 when the *Bedingfield* judgment was entered. (R. 36)

Had any *Bedingfield* plaintiff sought to attack the exemption scheme here under attack, he or she would have lacked standing so to do. *Eagerton* v. *Williams*, 433 So.2d 436, 447 (Ala. 1983). *Eagerton* logically held that an Alabama taxpayer is not a proper party plaintiff until he demonstrates an economic interest in the rights he seeks to protect. 433 So.2d, at 447.

In effect, the Alabama Supreme Court's failure to recognize fundamental cause of action and party identity differences between the plaintiffs here and those in the *Bedingfield* case, amounts to an attempted overruling of *Martin* v. *Wilks*, 490 U.S. 755 (1989) and a long line of cases in this Court which follow *Hansberry* v. *Lee*, 311 U.S. 32 (1940). These cases are summarized in *Martin, supra*:

> All agree that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry* v. *Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). See, e.g., 762 *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327, n. 7, 99 S.Ct. 645, 649, n. 7, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443, 28 L.Ed.2d 788 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* 395 U.S. 100, 110, 89 S.Ct. 1562, 1569, 23 L.Ed.2d 129 (1969). This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure A 4449, p. 417 (1981) (hereafter 18 Wright). A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.
>
> — 490 U.S. at 762

Indeed, the white firefighters allowed to challenge employment decisions taken pursuant to consent decrees in *Martin* were not the total strangers to those decrees that Richards and Hill are to the *Bedingfield* case. Notices of hearings upon those consent decrees were published in local newspapers, and the Birmingham Firefighters Association (of which they were members) appeared at those hearings and filed objections. 490 U.S. at 759. Nevertheless, they were entitled to a day in court, not as a matter of civil procedure, but as a matter of right, 490 U.S. at 763, because:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger... Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Chase National Bank* v. *Norwalk*, 291 U.S. 475, 479 (1934).

Can this due process standard peacefully coexist with the Alabama Supreme Court's denial to Richards and Hill of rights enforceable under 42 U.S.C., § 1983? We think not.

CONCLUSION

Meritorious federal constitutional claims which have never been heard, and which could not have been heard in *Bedingfield* v. *Jefferson County, supra,* hang in the balance of this Court's consideration. We respectfully submit that these claims and these plaintiffs are sufficiently distinct from anything and everything embraced by *Bedingfield, supra,* to warrant reinstatement of the trial court's order that they be heard. We petition this Court for an order reversing the decision of the Alabama Supreme Court and remanding this action to a forum which will allow Richards and Hill a day in court. Otherwise, an asinine and patently unconstituional exemption scheme built into Jefferson County's occupational tax will be insulated forever from federal constitutional scrutiny.

Respectfully submitted,

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